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U.S. Equal Employment Opportunity Commission

Hearing before the Government Reform Subcommittee on the Federal Workforce and Agency Organization

"Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court"

November 9, 2005

Chairman Porter, Congressman Davis, Members of the Subcommittee. Thank you for inviting me to testify today on this very important topic. I am Cari M. Dominguez, Chair of the U.S. Equal Employment Opportunity Commission (EEOC). I would like to commend this Subcommittee on its laudable efforts to improve the Federal employee appeal and complaint process.

We meet today to discuss the topic *Justice Delayed is Justice Denied: A Case for a Federal Employees Appeal Court.* Designing a process that efficiently and effectively resolves workplace disputes is of paramount importance to the federal government and to taxpayers. EEOC plays a significant role in that process.

Overview of the U.S. Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission was created by Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination on the bases of race, gender, color, national origin and religion. As originally passed the Act did not cover federal government employees. In 1972, amendments to the Act extended protections to federal workers and charged the then Civil Service Commission with ministerial responsibilities. As a result of the President's Reorganization and Civil Service Reform Act of 1979, that responsibility was transferred to the EEOC. The Commission also has oversight for the Age Discrimination in Employment Act, the Equal Pay Act and the Rehabilitation Act. All of these acts extend their protection to federal employees.

Given its original mission, the Commission plays a very large role in the resolution of charges of discrimination in the private sector. In fiscal year 2004 we received approximately 79,000 charges against private sector and state and local government employers. Our role in the federal sector is quite different. The statute extending protection to federal employees against discriminatory actions creates a system whereby complaints are filed by federal employees with their agencies and investigated by their agencies. Following the protections extended by the former Civil Service Commission, EEOC's regulations then provides for administrative hearings and appeals. In FY 2004, across the government, there were 42,412 requests for counseling,

which is an informal pre-complaint stage, and 19,024 formal written complaints were filed by federal government employees. For that same period EEOC received more than 9,000 requests for hearing and over 7,800 appeals.

The Need for Reform

As noted above, EEOC's jurisdiction is derived from our nation's civil rights laws which apply to both federal and private sector employees. Ours is a complaint-driven system. That is, federal employees have the right to file EEO complaints if they believe their rights have been violated. When employees believe violations of the law have occurred, they should be able to obtain prompt corrective action.

While this hearing is focused on the multiple complaint and appeal processes available to federal employees, our view is through the lens of the EEOC process; the process that we deal with on a daily basis. One of my goals has been to make the federal sector complaint process more responsive, more effective and more efficient. Many of the concerns that have been raised by the Senior Executives Association, particularly as they relate to the timeliness and efficacy of the EEO process, are concerns we share. We recognize that reform of the federal EEO process is warranted – there are indeed problems that need to be addressed.

This hearing borrows as its title the adage that justice delayed is justice denied. Indeed, the federal EEO process has been perennially criticized as too slow, too cumbersome, too expensive and subject to perceived or real conflicts of interest. As currently designed, the federal process--from contact with an EEO counselor to appellate decision -- can take years. Costs are excessive to complainants, agencies, and taxpayers. Many critics of the system consider the current arrangement, under which the same agency accused of discrimination investigates a complaint, as a conflict of interest. Because of its accessibility to employees, the EEO process is sometimes used to address workplace disputes that belong in another forum. Clearly, these issues raise the question as to whether agencies, employees, and taxpayers are being well served.

If there is no dispute that the system needs a makeover, and if it is going to be improved, the question then becomes: what is the best way to do it?

Steps Toward Improvement

The federal sector complaint process has existed for over 30 years, and during almost that entire period has been under review. At EEOC we are constantly looking for ways to address the problems and make the system better. Our regulations were amended in 1992 and 1999. The 1999 amendments most significantly placed increased emphasis on the use of alternative dispute resolution (ADR). The revised regulations encourage agencies to use ADR to resolve complaints at all stages of the process and require agencies to have ADR programs during both the pre- and formal complaint process. In our agency, I personally instituted a policy that requires managers to participate in ADR if sought by a complainant.

By increasing the ADR participation rate, we anticipate a decrease in the number of formal complaints filed. In fact, the number of formal complaints has been decreasing over the past 5

fiscal years, down by over 5,000, from 24,524 in 2000 to 19,024 in 2004. As successful ADR programs are adopted throughout the federal government and cost savings achieved, agencies will be able to shift valuable resources to proactive prevention activities that are aimed at resolving conflict in the workplace at an earlier stage to create more productive and efficient workplaces.

We have also initiated a relationship management pilot program with several federal agencies. This pilot allows us to work with agencies in a consultative manner, with the goal of improving the processes within an agency and assisting them in developing sound EEO practices. Once again, the goal is to ensure due process while promoting sound management practices. We believe that these proactive steps will serve to reduce the number of complaints being filed.

To complement our relationship management program, we have stepped up our outreach and technical assistance activities. Last year our staff participated in more than 750 outreach and technical assistance events covering federal sector programs and issues. I have personally reached out and have been meeting with Agency heads to discuss the state of EEO in their agencies. Among the issues I have addressed at these meetings is the need to improve the case management process.

A New Approach is Needed

All of these measures are designed to lead to better agency EEO programs and ultimately to fewer EEO complaints. But complaints will continue to be filed, and these initiatives don't address the heart of the subject today – how can the complaint – hearing – appeal process work better, more effectively and more efficiently? A major problem is the length of time it takes to investigate and resolve a complaint. We are encouraged by the improvement in processing EEO hearings and appeals. With significant management oversight, between FY 2003 and FY 2005, our average processing time for hearings dropped over 40% from 421 days to 249 days and our hearings inventory dropped over 30% from 8,467 to 5,896. On the appeals side, the processing time for appeals dropped 32% between FY 2003 and FY 2005 and 58% between FY 2002 and FY 2005. Our appellate inventory at the end of FY 2005 represents a 70% drop from our FY 2000 inventory. Even with significant improvements in recent years, the overall time for case processing, including the time for investigations at the agency level, continues to exceed acceptable levels - and that must be addressed. There is only so far that initiatives such as those described above can take us in resolving these issues. At some point there must be a review and assessment of the operational foundation of the process.

While more training and outreach provide opportunities for improvement in the process, in my view what is needed is a better model and a more flexible system. It is critical that sufficient resources be devoted to those cases where it is likely that discrimination has occurred. The EEOC's private sector charge process serves to inform us. Our private sector complaint processing system was overburdened and time-consuming. At one point, we had over 111,000 charges backlogged, and the average processing time to complete a charge -- about 380 days -- was well over a year. Without a significant change, we estimated that it would take more than 16 months to even begin an investigation in 1996 and the time would expand geometrically to 60 months in ten years. In the mid-nineties, the Commission adopted a system, known as Priority

Charge Handling Procedures, designed to address charges using evidence and severity of allegations as guides. It is a model similar to the "triage" system applied in the health care field, whereby the most compelling cases are handled first. We have found the system to be far more efficient, responsive and fair than the previous "first-come, first-serve" approach, where all charges, regardless of merit, were afforded the same time and attention. The average processing time for charges filed with EEOC in the private sector, including time spent exploring mediated resolutions, is less than half of what it was 10 years ago and has averaged 165 days in the last three years. I believe that we need to draw from lessons learned in the Commission's private sector model to design a federal sector system that is truly the best.

I would propose that agencies continue to use the tools at their disposal, such as counseling, training and mediation, to resolve issues prior to a formal complaint being filed. Strong alternative dispute resolution programs are needed to provide the possibility of early resolution to all types of workplace disputes.

Are the Various Appeal Systems Overlapping and Redundant?

One of the concerns frequently voiced is that the various processes for employee complaints and appeals are redundant and overlapping. Again, this is an issue that we can only address from the perspective of the EEOC process. We strongly support statutory and regulatory requirements that employees elect among various forums. Congress has provided employees rights and protections administered by several different agencies, EEOC, FLRA, OPM, and MSPB, OSC, under several different statutes, which range from protecting whistle blowing to grievances under collective bargaining agreements to civil rights. Each of the agencies cited above has expertise under various statutes and each area of law has a body of precedent that has built up over the years. In the vast majority of cases the issues raised by employees are quite different and the application of statutory law to those issues is unique to that forum.

By way of illustration, there is a type of case where EEOC reviews decisions of the MSPB to ensure proper application of the employment discrimination laws. These are known as "mixed cases" and are frequently cited by those who raise the redundancy issue. Yet, over the years, review of MSPB decisions has averaged less than 3% of our appellate cases. In 2005 review of MSPB decision amounted to only 1.1% of EEOC's total appellate receipts. In the past 5 years, EEOC has only disagreed with MSPB on a discrimination issue on 4 occasions and over the past 15 years there has only been one case where conflicting MSPB and EEOC positions resulted in a "Special Panel" being convened. Likewise, EEOC may review certain grievance decisions from the Federal Labor Relations Authority on issues of discrimination, but again, those cases make up very little of EEOC's appellate workload - 0.2% of appellate receipts in 2005.

The Federal Employees Court of Appeals

We think that reform of the various dispute resolution processes, to include the federal EEO process, can be a positive step. Any change that is advanced must be one that will truly bring about improvement. Although the concept of a "one stop process" is worth exploring, we question whether the creation of a new Article I court without any changes to the administrative process would yield the results intended. Therefore, we think that the proposal needs further

study. The workload alone for the new court would be immense – and would include EEO complaints, MSPB appeals, FLRA matters, grievances, classifications appeals, and Special Counsel investigations. As I indicated earlier, over 42,000 employees contacted an EEO counselor and more than 19,000 EEO complaints were filed with agencies in fiscal year 2004. By contrast, over the last five years federal employees filed fewer than 1,300 lawsuits raising discrimination issues in federal district courts.

Further, the proposal under consideration would place all workplace disputes into a judicial forum – one that has the potential to become more legalistic, more expensive, more intimidating, and likely more time consuming than the existing processes. It may well have the effect of discouraging employees from seeking redress for any discrimination experienced, and that should not be the goal or result of a reform proposal.

Resolution of employee disputes, and most particularly adherence to civil rights laws, are matters of importance to agency managers and executives. Indeed they are integral to good management and governance. If there is to be a level playing field in the workplace, resolution of claims of discrimination, in particular, deserve standing beyond being categorized as one of an amalgam of employee disputes.

Summary

Ensuring a workplace free of discrimination is vital to our Nation's interests. Much progress has been made, yet more remains to be done. Improving on an approach that allows for the proficient resolution of workplace disputes is an objective that we share and work diligently to meet.

It is important that we and this Subcommittee continue to look at ways that we can design a system that works better. We believe that reform, informed by what works well in the current administrative framework as the starting point, provides the best platform for those efforts.

Thank you for the opportunity to comment on this issue. I will be happy to answer any questions you might have.